BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

DECISION OF THE BOARD

In the Matter of the Petition for Redetermination Under the Hazardous Substance Tax Law of DOUGLAS C. ELLIOTT *Petitioner*

Appearances:

For Petitioner:	Douglas C. Elliott
For Department of Toxic Substances Control:	Daniel Weingarten Staff Counsel
For Department of Special Taxes and Operations, State Board of Equalization:	Janet Vining Senior Tax Counsel

This Decision considers the merits of a petition for redetermination, filed pursuant to Revenue and Taxation Code Section 43001, of a hazardous waste generator fee, imposed by Health and Safety Code Section 25205.5, for fiscal year 1987–88. The Board heard the petition for redetermination on August 11, 1992, in Torrance, California, and took the matter under submission.

The issue before us is whether Petitioner was the generator of contaminated soil which was excavated during the removal of a leaking underground storage tank located on Petitioner's property. We find that Petitioner was the generator of the contaminated waste and was therefore subject to the hazardous waste generator fee.

In 1984, Petitioner purchased a multi-tenant automotive repair facility located in Thousand Oaks, California. Petitioner was not aware that the property included an underground storage tank that had been used for the storage of used motor oils. Petitioner was required to remove the tank, which was leaking, and to excavate the surrounding contaminated soil. Petitioner completed the cleanup of the property in December 1987, including the disposal of 496.31 tons of contaminated soil. The contaminated soil constituted hazardous waste.

Petitioner asserts that the contamination was caused by the actions of one or more of the prior owners or tenants. There was no available information concerning when the tank was installed or over what period of time the waste oil leaked into the soil. Petitioner argues that one or more of the previous owners and/or tenants should be considered the generator of the hazardous waste. We disagree.

During the period at issue in this matter, Health and Safety Code Section 25205.5 required each generator of hazardous waste to pay the Board a generator fee for each generator site for each fiscal year. ‘‘Generator’’ is defined in Health and Safety Code Section 25205.1(e) to mean ‘‘a person who generates volumes of hazardous waste . . . at an individual site.’’ The regulations of the Department of Toxic Substances Control (the ‘‘Department’’) define ‘‘generator’’ to mean ‘‘any person, by site, whose act or process produces hazardous waste . . . or whose act first causes a hazardous waste to become subject to regulation’’ (Title 22, California Code of Regulations, Section 66260.10, previously Section 66078). During the period at issue in this matter, Health and Safety Code Section 25124 defined ‘‘waste’’ as ‘‘any discarded material . . . ’’

While the release of oil from the underground storage tank caused a hazardous substance to mix with the surrounding soil, the resulting contaminated soil, while hazardous, was not a ‘‘waste’’ as that term is defined in Health and Safety Code Section 25124. The contaminated soil was not a ‘‘discarded material’’ and did not become a waste until it was excavated and submitted for disposal. Since Petitioner was responsible for that excavation, Petitioner was the generator of the waste pursuant to the definition of ‘‘generator’’ in Health and Safety Code Section 25205.1(e).

Chapter 6.8 of the Health and Safety Code grants the Department the authority to order the removal or remediation of a release of a hazardous substance. Therefore, the Department could have required Petitioner, as the owner of the property, to clean up the site and excavate the contaminated soil. The site was thus subject to the Department’s ‘‘enforcement authority’’.

Chapter 6.5 of the Health and Safety Code sets forth the Department’s ‘‘regulatory authority’’. That chapter requires the Department to regulate all phases of the management and handling of hazardous waste in the state. Once Petitioner excavated the contaminated soil and classified it as hazardous, as required by Section 66262.11 of Title 22, California Code of Regulations (previously Section 66471), Petitioner became a regulated generator. As such, Petitioner was subject to the standards adopted by the Department that pertain to generators of hazardous waste, including the proper classification, labeling, packaging, manifesting, and transporting of the waste, as well as recordkeeping and reporting requirements. These standards were developed by the Department to insure the protection of the public health and safety and the environment. By first subjecting the hazardous waste to regulation, Petitioner was also a generator as that term is defined in the Department’s regulations.

Our holding today is consistent with the Legislature’s intent in imposing the hazardous waste generator fee. The fee is used to fund the Department’s regulatory activities, and it was the regulation of Petitioner’s management of the contaminated soil after excavation that resulted in costs to the State.

Since Petitioner was the generator of the hazardous waste at issue in this case, both by virtue of producing it and by first subjecting it to regulation, Petitioner is liable for the generator fee. Therefore, the determination in the amount of $10,780 is redetermined without adjustment.

Adopted at Sacramento, California, this 9th day of March, 1994.

Brad Sherman, Chairman
Matthew K. Fong, Member
Ernest J. Dronenburg, Jr., Member
Windie Scott, Member
Attested by: Burton W. Oliver, Executive Director